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Subject: Clean Water Act Jurisdiction at Cargill's Redwood City Plant Site

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To: File

Introduction

This memorandum is intended to discuss the issues associated with asserting Clean Water Act jurisdiction over Cargill's Redwood City Plant Site, with particular attention to issues arising out of the Supreme Court's decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"). This memorandum will also address potential bases for regulatory jurisdiction under the Rivers and Harbors Act of 1899.

Summary of Analysis

Portions of the Redwood City Plant Site are almost certainly subject to federal regulatory jurisdiction. The unfilled slough channels in Cargill's storage ponds are regulated under the Rivers and Harbors Act. Any wetlands on the Plant Site are adjacent to San Francisco Bay. In addition, roughly 90 acres of uplands at the Plant Site are almost certainly not subject to federal regulatory jurisdiction.

There is substantial room for debate as to the remainder of the Plant Site. The Corps of Engineers would need to determine whether the filled slough channels within the crystallizers on the Plant Site are subject to Rivers and Harbors Act jurisdiction. With regard to Clean Water Act jurisdiction, the SWANCC decision has put into doubt our ability to assert "other waters" jurisdiction at the site. EPA and the Corps of Engineers have never definitively agreed as to whether slough channels behind dikes are subject to Clean Water Act "tidal waters" jurisdiction. There is a sound basis for finding that the storage ponds on the Plant Site are jurisdictional impoundments; however, this argument is significantly weaker with regard to the crystallizers. Little case law or guidance exists on this point. However, the "tidal waters" and "impoundment" jurisdictional theories are potentially vulnerable to attack following the SWANCC decision, since the Plant Site is designed to be hydrologically isolated from San Francisco Bay. No factual evidence has been developed to support a finding that any portion of the Plant Site is a regulated tributary of San Francisco Bay.

Finally, Cargill may be able to show that some or all of the Plant Site is exempt from

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Clean Water Act (but not Rivers and Harbors Act) jurisdiction on the grounds that the ponds and crystallizers are either exempt settling ponds or waste treatment ponds. These legal theories are largely untested.

Site Description

Cargill's 1400 acre Redwood City Plant Site was constructed prior to the enactment of the Federal Water Pollution Control Act of 1972 ("Clean Water Act" or "CWA"). The Plant Site was constructed in the salt marsh and tidal sloughs within the margin of San Francisco Bay. The Plant Site was constructed primarily through the installation of a network of levees which form the boundaries of the storage ponds and the crystallizers. Roughly speaking, the Plant Site consists of 700 acres of storage ponds, 600 acres of crystallizers, and 90 acres of uplands (levee tops and building sites).

The basic topography of the storage ponds is unchanged beyond the construction of the levees. The preexisting salt marsh has been largely destroyed in the storage ponds due to the inundation of brines and saltmaking wastes. Some wetlands may still exist around the fringe of these ponds. The preexisting sloughs are still visible, although they have also been inundated by the brines and saltmaking wastes.

The crystallizers have been more substantially manipulated. There is no record of outside fill material being placed in the crystallizers. However, Cargill has routinely employed earthmoving equipment in the crystallizers to form them into shape for salt harvesting. Each bed is roughly rectangular and very shallow. In addition, during harvesting, Cargill employs harvesting equipment to physically extract salt from crystallizers.

The crystallizers and storage ponds are designed so as to not be directly connected to San Francisco Bay. Bay water only reaches the Plant Site after passing through an extensive network of evaporation ponds. It is possible that during intense storms that some bay water may reach the storage ponds (and conceivably the crystallizers). However, there is no proof of this ever occurring. Both the crystallizers and the storage ponds receive winter rain water and, to a limited degree, stormwater run on.

In a few places, more substantial filling has occurred to create upland building pads and to dispose of waste muds. Some of this filling has occurred (most notably within the crystallizer beds) since enactment of the Clean Water Act. Neither EPA nor the Corps of Engineers has required permits under the Clean Water Act for any of this filling activity, or for the use of earthmoving equipment in the crystallizers.

Cargill has not harvested salt at the Redwood City Plant Site for at least two years. Cargill has publically stated its intention to cease making salt in Redwood City, and is

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negotiating the sale of the evaporation ponds that delivered the brines to Redwood City.

Legal Analysis

The jurisdictional status of Cargill's salt making system has been controversial for decades. A brief summary of the federal litigation regarding these properties (involving both Cargill and its predecessor Leslie Salt) is set forth below. The two federal statutes relevant to this analysis are the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq (which authorizes regulation of "navigable waters") and the Clean Water Act, 33 U.S.C. § 1251 et seq (which authorizes regulation of waters of the United States).

Rivers and Harbors Act Jurisdiction

The Rivers and Harbors Act establishes jurisdiction for the Corps of Engineers to regulate the creation of structures in navigable waters such as San Francisco Bay. This jurisdiction extends to the mean high tide line of tidal waters as determined by the water's natural (i.e. unobstructed) state. Leslie Salt v. Froelke, 578 F.2d 742, 753 (9th Cir. 1978). The holding of this decision applies to the Cargill's property, and so would appear to provide a clear basis for Rivers and Harbors Act jurisdiction over at least portions of the Redwood City Plant Site.

As applied to the Redwood City Plant Site, without the obstruction of the levees, tidal water would return to the historic slough channels within the Plant Site. At a minimum, this would establish Rivers and Harbors Act jurisdiction over the still visible slough channels within the storage ponds on the Plant Site. Within the crystallizers, the slough channels have been obliterated; however, it would be relatively straightforward to determine where the slough channels had extended. It is unclear whether the Corps would determine that Rivers and Harbors jurisdiction still remained in the now obliterated slough channels. This issue has never been litigated.

Clean Water Act Jurisdiction

As a general matter, the Clean Water Act expanded on Rivers and Harbor Act jurisdiction to establish regulatory jurisdiction over discharges of pollutants to all waters of the United States. However, the exact contours of this regulatory jurisdiction is unsettled. In particular, EPA and Corps rulemakings defining the scope of waters of the United States create uncertainty as to extent of Clean Water Act jurisdiction at the Redwood City Plant Site. Moreover, the SWANCC decision has created even further uncertainty as to the extent of Clean Water Act regulatory jurisdiction.

EPA and Corps of Engineers regulations set forth a number of categories of waters of the United States. Of most direct relevance here are

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(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; ...

(3) All other waters...the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters...[w]hich are or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified ... [above];

(7) Wetlands adjacent to waters ... identified ... [above].

33 CFR § 328.3(a).¹

Other Waters Jurisdiction - 33 CFR § 328.3(a)(3)

Prior to the SWANCC decision, the strongest basis for asserting CWA jurisdiction over the storage ponds and crystallizers would have been under 33 CFR § 328.3(a)(3) as “other waters... the use, degradation or destruction of which could affect...commerce.” Under this rationale, we would have identified the storage ponds and crystallizers as artificial ponds. See Leslie Salt v. United States, 896 F.2d 354, 359 (9th Cir. 1990) (artificial waters can be “other waters” for purposes of CWA jurisdictional regulations). To satisfy the requirement for an affect on commerce, we would have found that the documented use of the ponds by migratory birds demonstrates sufficient ties to interstate commerce. Leslie Salt v. United States, 896 F.2d at 360. In addition, we would have found that the storage ponds and crystallizers “could be used for industrial purposes by industries in interstate commerce”, since Cargill used the ponds for saltmaking. See Leslie Salt v. Froelke, 578 F.2d 742, 755 (9th Cir. 1978)(activities within Leslie’s salt ponds affect interstate commerce, since Leslie is a major supplier of salt).

The SWANCC decision, however, casts considerable doubt on the continued vitality of this line of analysis. SWANCC held that “33 CFR 328.3(a)(3), as clarified and applied ... pursuant to the ‘Migratory Bird Rule,’ exceeds the authority granted ... under section 404(a) of the CWA.” 531 U.S. 159, 174(2001). It is, therefore, untenable to rely on migratory bird usage to support CWA jurisdiction at the site. Beyond the specific holding in SWANCC concerning the

¹ Relevant EPA regulations include essentially identical provisions. The Corps of Engineers regulations are cited herein for convenience.

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Migratory Bird Rule, it is unclear to what extent and under what circumstances EPA and the Corps of Engineers can rely on 33 CFR § 328.3(a)(3) as a basis for CWA jurisdiction. Specifically, the agencies, to date, have not taken an official position as to whether they intend to rely on a water's potential for use for industrial purposes, such as saltmaking, to support "other waters" jurisdiction under 33 CFR 328.3(a)(3).²

Tidal Waters Jurisdiction - 33 CFR 328.3(a)(1)

While the storage ponds and crystallizers are no longer subject to the ebb and flow of the tide, portions of these features may still be subject to regulation under 33 CFR 328.3(a)(1). EPA Region IX (with the concurrence of EPA Headquarters) has taken the position that this provision is applicable to areas that have been diked off from tidal influence "if they have not been legally filled to elevations which are above the plane of [mean high tide]" Geographical Extent of Clean Water Act Jurisdiction at Bolsa Chica, Orange County, CA, February 10, 1989.

EPA has not determined what portions of the Plant Site would be subject to jurisdiction under this theory. However, at a minimum, this theory would provide a basis for asserting Clean Water Act jurisdiction over the still visible slough channels with the storage ponds. As to the obliterated slough channels within the storage ponds, this theory probably will not support jurisdiction. The crystallizers were constructed prior to the enactment of the Clean Water Act. Therefore, the slough channels were probably legally filled under the laws in effect at that time.³

A problem with this theory is that the Corps of Engineers has not accepted it as a basis for asserting Clean Water Act jurisdiction in areas behind levees that are below the mean high tide line. The San Francisco District has a substantial record of asserting jurisdiction under the Rivers and Harbors Act for such features, but not asserting Clean Water Act jurisdiction in such areas. Given the dispute between the agencies with regard to this issue, there is significant risk in relying on tidal waters jurisdiction as a basis for Clean Water Act jurisdiction even in the slough channels within the storage ponds.

² Should the agencies assert jurisdiction on this basis, they would also need to address the fact that Cargill is no longer using the Plant Site to make salt.

³ It could be argued that the construction of the entire Plant Site was illegal in that no permits were obtained for its construction under the Rivers and Harbors Act. The District Court considered this argument in Sierra Club v. Leslie Salt, 412 F.Supp 1096 (N.D. Cal 1976), and held that the United States was estopped from regulating maintenance of Leslie's saltmaking facilities because of the Corps' failure to assert Rivers and Harbors Act jurisdiction prior to 1971. 412 F.Supp. at 1104. A similar analysis would probably apply to any attempt to argue that the slough channels within the crystallizers were illegally filled.

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An added complication concerning asserting jurisdiction over diked tidal areas arises due to SWANCC. In SWANCC, the Supreme Court indicated that its earlier decision confirming Clean Water Act regulatory jurisdiction over adjacent wetlands was informed by “the significant nexus between the wetlands and ‘navigable waters’”, and observed that adjacent wetlands were “inseparably bound up with the ‘waters’ of the United States.” 531 U.S. at 167 (2001)(internal quotations omitted). The Plant Site is designed to be hydrologically isolated from San Francisco Bay. It could not function otherwise. Cargill could argue that Clean Water Act jurisdiction should not extend to formerly tidal areas that are now hydrologically isolated from navigable waters.

Impoundment Jurisdiction

The levees at the Plant Site completely surround significant portions of what once was San Francisco Bay in order to hold and manipulate brines extracted from Bay waters, and to store waste products generated by this process. Given these facts, the agencies could find that the storage ponds and crystallizers created by the levees are impoundments of waters of the United States for purposes of 33 CFR § 328.3(a)(4). This is a largely untested theory.

There is no regulatory definition of what constitutes an impoundment. EPA proposed to promulgate a definition of this term in 1979 in its Consolidated Permit Regulations. 44 FR 34272. However after receiving comments that the proposed definition was either “too expansive, too restrictive, or not necessary,” EPA elected not to promulgate the definition on the grounds “the definition served no purpose.” 45 FR 33299.

While there has been substantial litigation in other contexts regarding impoundments⁴, very little case law has been developed as to the meaning of that term for purposes of the definition in 33 CFR § 328.3(a)(4). To determine that either the storage ponds or the crystallizers are impoundments for purposes of these regulations would likely be precedent setting. However, to the extent other Clean Water Act precedent is relevant, there is nothing in the existing case law that would appear to preclude this analysis.

As a factual matter, we would have a substantially stronger case in arguing that the storage ponds are impoundments for purposes of 33 CFR § 328.3(a)(4) than we would the crystallizers. The storage ponds are used solely for holding brines and wastewaters generated by the salting process. This is closely analogous to the conventional definition of impoundment as something created for the purposes of holding water or other fluids. The crystallizers, as a

⁴ See e.g., Committee to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305 (9th Cir. 1993); National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1987); United States v. Larkins, 852 F.2d 189 (6th Cir. 1987)

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factual matter much more complicated in this regard. Cargill brings saturated brines into the crystallizers for purposes of crystallizing out the salt. For this to occur, Cargill must hold the brines in the crystallizers while the salt crystallizes out. During this portion of the operation, the crystallizers function as impoundments. However, following completion of the crystallization stage, the uncrystallized brines are removed and the salt crystals are mechanically harvested. During this stage, the crystallizers do not function as impoundments. Given the complex factual circumstances present in the crystallizers, we would have a significantly more difficult case arguing that the crystallizers are impoundments for purposes of 33 CFR § 328.3(a)(4).

This theory for jurisdiction is vulnerable to the SWANCC analysis discussed above with respect to tidal waters jurisdiction. Since Cargill's ponds and crystallizers are designed to not overflow into San Francisco Bay, Cargill could argue that impoundment jurisdiction cannot be extended to the Plant Site in light of SWANCC.

Tributary Jurisdiction - 33 CFR § 328.3(a)(5)

During heavy rainstorms that occur at extremely high tides, it is possible that portions of the Plant Site could overflow into San Francisco Bay or vice-versa. EPA has not developed a factual record on this issue. If such overflow events could be documented, it may be possible to argue that the affected portions of the Plant Site are tributaries of San Francisco Bay. This theory would require substantially more legal and factual development before we could rely on it as a basis for asserting Clean Water Act jurisdiction at the Plant Site.

Adjacency Jurisdiction - 33 CFR § 328.3(a)(7)

Wetlands adjacent to waters of the United States are also waters of the United States. To the extent there are any wetlands at the Plant Site, we could make a strong argument that they are sufficiently close to San Francisco Bay that they should be considered adjacent wetlands. Cargill might contend that any such wetlands are hydrologically isolated from the bay due to Cargill's levees. This argument should fail since the regulatory definition of adjacency includes "[w]etlands separated from other waters by man-made dikes or barriers." 33 CFR § 328.3(c).

This argument may be sufficient to establish some limited Clean Water Act jurisdiction at the Plant Site. While EPA has not established the presence of any wetlands at the Plant Site, it is reasonably likely that a wetland fringe may exist around at least some of the storage ponds. Given the extensive manipulation of the crystallizers, it is less likely that any wetlands exist there.

Industrial Pond Exclusion/Waste Treatment Pond Exclusion

Even if Cargill's Plant Site satisfies one or more of the above criteria for asserting CWA

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jurisdiction, Cargill would likely argue that some or all of the ponds and crystallizers are exempt from jurisdiction as either industrial ponds or waste treatment ponds. The exclusion for some industrial ponds was first established in the preamble to the Corps of Engineers' 1986 regulations. The waste treatment pond exclusion is set forth at 33 CFR § 328.3(a)(8).

The industrial pond exclusion provides that the Corps "generally do[es] not consider [jurisdictional]...[a]rtificial lakes and ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins or rice growing." "However, the Corps [and EPA] reserves the right on a case-by-case basis to determine that a particular waterbody within ... [this] category is a water of the United States. 51 FR 41217.

The crystallizers and at least some of the storage ponds at the Plant Site could be considered settling basins. A more difficult question is whether, for purposes of this provision, these ponds would be considered to have been created out of "dry land". As discussed above, the Plant Site was created prior to the Clean Water Act out of wetlands and slough channels. At this time, the slough channels were subject to federal jurisdiction under the Rivers and Harbors Act, but the wetlands were not. There is no relevant case law on the application of this provision to ponds created prior to the Clean Water Act, so it is difficult to predict whether Cargill could escape Clean Water Act jurisdiction over any portion of the Plant Site under this theory.

With regard to the waste treatment pond exclusion, Cargill has taken the position in San Francisco Baykeeper v. Cargill that ponds used to handle saltmaking wastes are part of its waste treatment system and, therefore, are not waters of the United States. EPA disagrees with this position. However, EPA's position on this issue is not without litigation risk.

Litigation History

Leslie Salt v. Froelke

In 1972, the Sierra Club sued Leslie Salt to compel Leslie to remove dikes it had built to construct salt making facilities on Bair Island in San Francisco Bay. In 1973, Leslie Salt Co. sued the Secretary of the Army seeking a declaration that the United States had unlawfully claimed regulatory authority under the Rivers and Harbors Act and the Clean Water Act over these diked salt ponds shoreward of the mean high water line. In ruling on these consolidated actions, the district court accepted the United States' position that regulatory jurisdiction under the Clean Water Act and the Rivers and Harbors Act could properly extend to the diked salt ponds at least to the mean higher high water line, a significantly broader jurisdictional boundary. Leslie Salt v. Froelke, 403 F.Supp. 1292 (N.D.Cal. 1974); Sierra Club v. Leslie Salt, 412 F.Supp. 1096 (N.D.Cal. 1976). However, the court held that the United States was estopped from compelling Leslie to remove existing dikes because of the Corps' failure to assert Rivers and

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Harbors Act jurisdiction over the dikes prior to 1971.

The Court of Appeals significantly altered the holdings of the District Court. The Court of Appeals held that Rivers and Harbors Act jurisdiction only extended to the mean high water line. However, the Court of Appeals held that Clean Water Act extended beyond Rivers and Harbors Act jurisdiction at least to the mean higher high water line. The Court of Appeals then remanded the action to the District Court for further proceedings. 578 F.2d 742.

Leslie Salt v. United States

In 1985, the U.S. Army Corps of Engineers issued a cease and desist order to halt certain activities Leslie was conducting on properties that had ceased being part of its salt making operations, the Newark-Coyote property. Leslie filed suit against the United States contending that the properties at issue were not regulated by the Clean Water Act. The Corps of Engineers then filed suit against Leslie to enforce against the activities it contended were unlawful. The properties at issue consisted of abandoned salt crystallizers, and pits that had been used for disposal of calcium chloride. The District Court determined that none of the property at issue were waters of the United States. 700 F.Supp 476.

The Court of Appeals reversed portions of the findings of the District Court, and concluded that some seasonal ponds on the property, and some wetland acreage on the property were properly regulated under the Clean Water Act. 896 F.2d 354. However, the United States did not appeal some of the District Court's conclusions as to whether certain areas met the regulatory criteria, so substantial acreage in this litigation was ultimately determined to be not regulated. The case was then remanded to the District Court for more detailed findings as to the extent of jurisdiction, and the determination of the appropriate civil penalty.

San Francisco Baykeeper v. Cargill

San Francisco Baykeeper filed this action in 1996 contending that certain waste disposal practices of Cargill illegally discharge wastes to waters of the United States in violation of the Clean Water Act, and were not in compliance with Clean Water Act provisions governing stormwater runoff. In that action, the District Court agreed that the areas at issue were waters of the United States, and that Cargill's actions violated the Clean Water Act. However, the District Court's conclusion that the areas at issue were waters rested on its conclusion that these areas were isolated waters that functioned as habitat for migratory birds. The Ninth Circuit Court of Appeals vacated this holding in light of the Supreme Court's decision in SWANCC, and remanded the matter to the District Court for further reconsideration of the jurisdictional issues. This matter is still pending in the District Court, as is a related EPA enforcement action concerning these activities.

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If this case does not settle, it is likely to pose a number of jurisdictional issues similar to those discussed in this memorandum.